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No. 09-325

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Twelve months ago, the government told the First Circuit that "[t]his case presents questions of great legal and practical significance." Gov't C.A. Supp. Br. 1. But having sought rehearing en banc and persuaded the en banc First Circuit to hold (by a bare 3-2 margin) that petitioner was not entitled to attorney's fees under the Equal Access to Justice Act (EAJA), the government now argues that this case no longer warrants further review because "the issues in this case[] are of little continuing importance." Br. in Opp. 22.

If anything, however, this case is an even stronger candidate for further review now than it was when the government sought rehearing in the First Circuit. Since then, the Tenth Circuit held in *Al-Maleki* v. *Holder*, 558

F.3d 1200 (2009), that a similarly situated applicant for naturalization, who had brought suit under 8 U.S.C. 1447(b) and obtained a court-ordered remand, was entitled to attorney's fees under EAJA. The en banc First Circuit's subsequent decision directly conflicts with *Al-Maleki*. In its brief in opposition, the government offers only the flimsiest of rationales for reconciling those decisions, and it does not dispute that the question presented has frequently recurred in the lower courts. The only plausible explanation for the government's change of heart, then, is that it is currently on the winning side of this case, rather than the losing one. Because the government was correct when it originally asserted that the case presents an issue of "exceptional importance," Gov't C.A. Pet. for Reh'rg 9, and because this case now implicates a clear circuit conflict, the petition for certiorari should be granted.

A. The Decision Below Conflicts With A Decision Of The Tenth Circuit And Implicates Broader Disarray Among The Lower Courts

1. The government principally contends that there "currently is no ripe conflict between the First and Tenth Circuits" because "the Tenth Circuit has not confronted a case involving the factual circumstances presented in this case." Br. in Opp. 20, 21. That contention lacks merit.

The government does not specify what it believes to be the relevant distinctions in the "factual circumstances" of the two cases. For its part, the First Circuit primarily attempted to distinguish *Al-Maleki* on the ground that the district court's order in this case, unlike the order in *Al-Maleki*, remanded the case to USCIS without expressly directing it to act on the application for naturalization by a specified date. See Pet. App. 15a n.12. That distinction, however, "elevates form over

function," because the order in this case similarly, if implicitly, incorporated the government's agreement to act on the naturalization application by a date certain. *Id.* at 31a n.3 (Torruella, J., dissenting). Indeed, that is how the order was understood by the district court itself. See *id.* at 111a; cf. *Perez* v. *Westchester County Dep't of Corrections*, 587 F.3d 143, 153 n.8 (2d Cir. 2009) (explaining that the prevailing-party inquiry "is in some regard about the intent of the district court").

Notably, the government does not argue that the distinction in the form of the remand order is legally relevant. And for good reason: in either form, the remand order (unlike an order of dismissal) provides a type of relief expressly contemplated by Section 1447(b), and thus works the "judicially sanctioned change in the parties' legal relationship" necessary to confer prevailing-party status on the applicant under EAJA. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).[1]

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[1] Indeed, because a remand order provides a form of relief expressly contemplated by Section 1447(b), it constitutes the equivalent of an "enforceable judgment on the merits," *Buckhannon*, 532 U.S. at 604, and confers prevailing-party status for that reason as well. See *Shalala* v. *Schaefer*, 509 U.S. 292, 300-302 (1993). The government suggests (Br. in Opp. 17 n.6) that *Schaefer* is distinguishable because it involved an order that both reversed a prior agency determination and remanded to the agency for further consideration. That is a distinction without a difference, however, because the statute at issue here, unlike the specific statute at issue in *Schaefer*, expressly provides for a simple remand as a form of relief in the plaintiff's favor. In addition, every court of appeals to have addressed the issue has held that a court considering a Section 1447(b) action must order a remand (or otherwise terminate the action) before USCIS can act on the naturalization application. See *Bustamante* v. *Napolitano*, 582 F.3d 403, 404 (2d Cir. 2009); Pet. 22 (citing other cases).

Put differently, there can be no real doubt that, if the Tenth Circuit were presented with the order in this case, it would still reach the same result and award fees. In *Al-Maleki*, the Tenth Circuit explained that the order at issue there did not merely "dismiss[] the case because there [was] no longer a dispute before [the court]." 558 F.3d at 1205 (alterations in original; citation omitted). Instead, the order "placed the weight of judicial authority behind USCIS's stipulation that [the applicant] was entitled to be naturalized," and, as such, "provided the judicial imprimatur which is indispensable to the prevailing party determination." *Id.* at 1206. That reasoning would apply equally to an order like the one at issue here, which similarly, if implicitly, incorporates the government's agreement to act on the naturalization application by a specified date. It is therefore unsurprising that, after identifying the foregoing factual distinction, the First Circuit took pains to emphasize that its decision "should not be taken as agreement with the panel decision of the Tenth Circuit [in *Al-Maleki*]." Pet. App. 16a n.12. Because the order in this case is functionally indistinguishable from the order in *Al-Maleki*, the two decisions cannot be reconciled, and the resulting conflict warrants the Court's review.

2. The government does not dispute that the federal district courts, reflecting the conflict between the First and Tenth Circuits, are in disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b). Instead, the government merely contends that "[a]ny such 'disarray' can and should be addressed by the courts of appeals in the first instance." Br. in Opp. 21 n.8.

Just a few months ago, however, the government successfully argued that this Court should grant review on another issue concerning the interpretation of EAJA

because, "[i]n addition to producing a circuit split," the issue had "spawned multiple internal conflicts within district courts." Pet. at 16, *Astrue* v. *Ratliff*, cert. granted, No. 08-1322 (Sept. 30, 2009). The same rationale applies here in spades: there have been at least 50 cases *since 2007* in which district courts have considered whether to award EAJA fees in Section 1447(b) actions, with courts adopting a variety of different rationales in disposing of those cases. See Pet. 17-18. Moreover, the government does not dispute that, despite the large number of cases in the district courts, relatively few cases have reached, or will reach, the level of the courts of appeals—much less this Court—because the amount of money sought in the typical EAJA request in a Section 1447(b) case is relatively modest (whereas the cost of an unsuccessful appeal is relatively large). See Pet. 30.[2] As the government correctly argued in *Astrue*, therefore, the disarray in the district courts provides an additional justification for further review.

3. In addition, the government seemingly concedes that, in the wake of this Court's decision in *Buckhannon*, there is broader uncertainty among the courts of appeals as to "how much or what kind of judicial imprimatur must be stamped on [a court order] before it renders a party 'prevailing.'" *Utility Automation 2000, Inc.* v. *Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238, 1250 (11th Cir. 2002) (Marcus, J., specially concurring); see Br. in Opp. 21 (recognizing the existence of

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[2] The docketing fee alone for a federal appeal is now $450. See Administrative Office of the U.S. Courts, Court of Appeals Miscellaneous Fee Schedule (Jan. 1, 2009) <www.uscourts.gov/fedcourtfees/courtappealsfee_january2009.pdf>. By way of comparison, that is more than 10% of the original fee award in this case. See Pet. App. 114a.

"differences in verbal formulations adopted by the courts of appeals for describing the test for prevailing-party status"). The government merely notes that "the court of appeals specifically concluded that the remand order at issue in this case 'would not create prevailing party status under the tests adopted by any of the circuits.'" *Ibid.* (quoting Pet. App. 17a).

That unelaborated conclusion, however, was simply incorrect. At a minimum, petitioner would plainly qualify as a prevailing party not only under the Tenth Circuit's standard in *Al-Maleki*, but also under the Ninth Circuit's standard, which requires only that the court order at issue provide "some judicial sanction" of the parties' agreement. *P.N.* v. *Seattle School District No. 1*, 474 F.3d 1165, 1173 (2007). By contrast, it is uncertain whether petitioner would qualify under the stricter or more formalistic approaches of other circuits. See Pet. 19-20. This case therefore presents the Court with an ideal opportunity not only to resolve the circuit conflict in the specific context presented here, but also more broadly to clarify what type of order is sufficient to render a party "prevailing" under EAJA and other fee-shifting statutes.

B. This Case Is An Ideal Vehicle For Consideration Of The Question Presented

1. The government suggests (Br. in Opp. 16, 21-22) that this case is a poor vehicle for further review because the Court would have to consider not only whether petitioner was a prevailing party for purposes of EAJA, but also whether the government's position was substantially justified.

Far from constituting a reason for denying review in this case, however, the First Circuit's error with regard to the substantial-justification requirement constitutes

an additional reason for granting it—as the government itself evidently believed, from the opposite direction, when it sought en banc review of the panel's decision as to both requirements. See Gov't C.A. Pet. for Reh'rg 7-15. With regard to the substantial-justification requirement, like the prevailing-party requirement, the First Circuit's decision cannot be reconciled with *Al-Maleki*, in which the Tenth Circuit held, in a materially identical context, that the government's position was not substantially justified. See 558 F.3d at 1206-1210. Although the First Circuit attempted to distinguish the Tenth Circuit's holding on the substantial-justification requirement on the ground that "that court was not faced with the justifications offered to us," Pet. App. 28a n.21, a review of the briefs indicates that the government advanced similar arguments before both courts as to that requirement. Compare, *e.g.*, Gov't C.A. Br. 20-28 and Gov't Supp. C.A. Br. 13-19 with Gov't Br. at 29-36, *Al-Maleki*, *supra* (No. 07-4260).

Nor is the analysis as to the substantial-justification requirement particularly complicated. The government's position was not substantially justified for the simple reason that the government utterly flouted its unambiguous regulatory obligations to conduct a background investigation first and then process petitioner's naturalization application within 120 days of his examination—obligations whose existence the government conspicuously does not dispute. See, *e.g.*, *Role Models America, Inc.* v. *Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (explaining that an agency's conduct "lack[s] sub-

stantial justification" where it is "wholly unsupported by the text of the applicable regulations").[3]

2. In the alternative, the government contends that this case is a poor vehicle for consideration of the substantial-justification requirement "because of the minimal factual record that has been compiled with respect to it." Br. in Opp. 22.

To begin with, consideration of any factual issues is unnecessary where, as here, the government's position is squarely inconsistent with applicable statutes or regulations. See *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988) (explaining that the question of whether the government's position was substantially justified may involve a "purely legal issue"); cf. Pet. App. 18a (holding "as a matter of law" that the government's position was substantially justified). But in any event, contrary to the government's suggestion, this case does not implicate any "disagreements about what happened or why," Br. in Opp. 22, because USCIS's policy of conducting background investigations only after examinations, and its accompanying policy of expediting background investigations for those applicants who sued the agency to challenge the resulting processing delays, are matters of public record. See, *e.g.*, C.A. App. 45. Unsurprisingly, then, the government does not specify what additional

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[3] The government suggests (Br. 18-19) that its position could nevertheless be substantially justified because petitioner suffered no harm from the government's failure to comply with its regulatory obligations. There is no basis for such a harmless-error inquiry, however, either in EAJA itself or in the underlying cause of action in Section 1447(b). And even if there were, petitioner did suffer harm, because he had to prosecute a federal lawsuit (and thereby incur legal expenses) in order to force the government to act on his naturalization application in a less untimely manner.

factual information it would like to have in the record—nor has it ever sought to introduce any additional information at earlier stages of this litigation. The government therefore can hardly suggest that its failure to do so constitutes a vehicle problem that precludes this Court's review.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

As noted at the outset, the government contends that this case no longer warrants further review on the ground that "the issues in this case[] are of little continuing importance." Br. in Opp. 22. That contention, too, lacks merit.

1. As a preliminary matter, there has been no material change in the relevant factual circumstances since October 2008, when the government sought en banc review in the First Circuit on the ground that the case presented an issue of "exceptional importance." Gov't C.A. Pet. for Reh'rg 9. As the government recognizes, USCIS had by that date abandoned its policy of conducting examinations of naturalization applicants before their background investigations were completed. See Br. in Opp. 5. The government had also announced its plan to eliminate the so-called "backlog" of delayed background investigations for naturalization applicants—and had in fact mostly eliminated that "backlog" (and indicated its intention to eliminate the remainder in a matter of months). See *id.* at 5-6. The government therefore cannot tenably argue that any subsequent elimination of the remainder of the "backlog" is sufficient to reduce the question presented in this case from one of "great legal and practical importance," as it contended as recently as twelve months ago, to one of "little continuing importance," as it now suggests.

2. In any event, the question presented is likely to recur in the specific context in which this case arises: *i.e.*, where an applicant for naturalization brings suit under Section 1447(b) because of delays in the completion of his background investigation. As the government acknowledges, as of April 2008, the Federal Bureau of Investigation (FBI) had failed to complete background investigations for almost *30,000* naturalization applicants whose examinations had already been conducted (but whose background investigations had been pending for *more than two years*). See Br. in Opp. 5. It is therefore probable that numerous cases remain in which the specific cause for the delay was the failure to complete a timely background investigation as a result of the "backlog." And such cases may continue to arise even now that the "backlog" has purportedly been eliminated, because USCIS has cautioned that, while the FBI is now completing its portion of background investigations within 90 days, the information provided by the FBI "may require further evaluation" (thus potentially "result[ing] in additional delays in processing"). USCIS, *USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) <tinyurl.com/uscisbacklog>.[4]

3. In addition, the question presented in this case—*i.e.*, whether an applicant for naturalization who brings suit under Section 1447(b) and obtains a court-ordered remand is entitled to fees under EAJA—will inevitably

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[4] Indeed, Section 1447(b) actions of this type have continued to be filed since USCIS's announcement that it had eliminated the "backlog," see Pet. 29 n.9 (citing cases), and still more have been filed even since the petition for certiorari in this case, see, *e.g.*, *Lucaj* v. *USCIS*, No. 09-14716 (E.D. Mich. filed Dec. 3, 2009); *Hussein* v. *Napolitano*, No. 09-1268 (E.D. Va. filed Nov. 12, 2009); *Al-Yaseri* v. *Heinauer*, No. 09-3226 (D. Neb. filed Nov. 5, 2009).

arise in other factual contexts, in which the cause of the delay is something other than the failure to complete a timely background investigation. The government wisely does not dispute that proposition, in light of its chronic and seemingly intractable inability to process naturalization applications in a timely manner. Indeed, Section 1447(b) was originally enacted in 1990—long before USCIS's recent problems with completing background investigations—out of concern that USCIS's predecessor agency had a tendency to put complex applications on the "backburner." See H.R. Rep. No. 187, 101st Cong., 1st Sess. 11-12 (1989). A decision by the Court in this case, moreover, would shed light on the broader issue of what is required to render a party a "prevailing party"—an issue that arises under a variety of different fee-shifting statutes in addition to EAJA. See Pet. 29-30.

In considering the bigger picture, however, one should not lose sight of the fact that the context in which this case arises is important in its own right. By requiring an applicant for naturalization to bring suit simply to force the government to process his application in a less untimely manner, the government has engaged in conduct that is not only unjustified, but affirmatively offensive. The least the government can do is to bear the modest cost of litigation that it effectively invited as a prerequisite of more expeditiously obtaining the priceless benefits of citizenship. The Court should grant review in order to eliminate the clear circuit conflict on the availability of EAJA fees and correct the manifestly unjust outcome of the court of appeals' decision.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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